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THE HONORABLE RICHARD A. JONES

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SUSAN OTOS,

Plaintiff,

vs.

WHPACIFIC, INC., an Alaska Corporation,

Defendant.

NO. 2:16-cv-01623-RAJ

ORDER

This matter comes before the Court on Plaintiff Susan Otos's Motion to Compel Answers and Responses to Plaintiff's Discovery Requests. Dkt. # 20. Defendant WHPacific, Inc. ("WHP") opposes the Motion. Dkt. # 23.

I. BACKGROUND

Plaintiff filed suit against WHP for age discrimination, gender discrimination, and wrongful discharge. Dkt. # 1-1 (Complaint). The parties met and conferred several times to discuss discovery disagreements but have come to a standstill. Plaintiff requested that WHP produce discovery from two non-party affiliates: NANA Development Corporation ("NANA") and Grand Isle Shipyard ("GIS"). WHP denies that it has access to either NANA's or GIS's documents.

1 Plaintiff further requested, generally, that WHP fully comply with her discovery
2 requests and submit more timely productions. WHP claims that it has consistently
3 produced documents on a rolling basis as they become available. Unable to resolve
4 the issues, Plaintiff now moves this Court to compel WHP to comply with her
5 discovery requests.

6 **II. LEGAL STANDARD**

7 The Court has broad discretion to control discovery. *Avila v. Willits Envtl.*
8 *Remediation Trust*, 633 F.3d 828, 833 (9th Cir. 2011). That discretion is guided by
9 several principles. Most importantly, the scope of discovery is broad. A party must
10 respond to any discovery request that is not privileged and that is “reasonably
11 calculated to lead to the discovery of admissible evidence.” Fed. R. Civ. P.
12 26(b)(1). The Court, however, must limit discovery where it can be obtained from
13 some other source that is more convenient, less burdensome, or less expensive, or
14 where its “burden or expense . . . outweighs its likely benefit, considering the needs
15 of the case, the amount in controversy, the parties’ resources, the importance of the
16 issues at stake in the action, and the importance of the discovery in resolving these
17 issues.” Fed. R. Civ. P. 26(b)(2)(C)(i), (iii).

18 Pursuant to Rule 37(a)(5)(A), if a motion to compel is granted, or if
19 requested discovery is provided after the motion is filed, “the court must, after
20 giving an opportunity to be heard, require the party . . . whose conduct necessitated
21 the motion, the party or attorney advising that conduct, or both to pay the movant’s
22 reasonable expenses incurred in making the motion, including attorney’s fees.” But
23 the Court is precluded from awarding expenses if: “(i) the movant filed the motion
24 before attempting in good faith to obtain the disclosure or discovery without court
25 action; (ii) the opposing party’s nondisclosure, response, or objection was
26 substantially justified; or (iii) other circumstances make an award of expenses
27 unjust.” Fed. R. Civ. P. 37(a)(5)(A).

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2 III. DISCUSSION

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5 A. “Control” Under Rule 34

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8 Federal Rule of Civil Procedure 34(a) allows courts to order production of

9 documents or items as long as those documents or items are in the possession,

10 custody, or control of a party to the litigation. Production of documents or items

11 possessed by related non-parties is warranted as long as the party to the litigation

12 has custody or control of those documents or items. *In re Citric Acid Litig.*, 191

13 F.3d 1090, 1107 (9th Cir. 1999); *United States v. Int’l Union of Petroleum & Indus.*

14 Workers, 870 F.2d 1450, 1452 (9th Cir. 1989). “Control” is defined as “the legal

15 right to obtain documents on demand.” *Int’l Union*, 870 F.2d at 1452. The Ninth

16 Circuit has refused to expand the definition of “control” to include a party’s

17 practical ability to obtain the documents or items requested. *In re Citric*, 191 F.3d

18 at 1107-1108. The party seeking production bears the burden of demonstrating

19 actual control; proof of theoretical control is not enough to meet this burden. *Int’l*

20 *Union*, 870 F.2d at 1454.

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22 Notwithstanding the definition of “control” set forth in *International Union*

23 and *In re Citric*, the Court notes that courts within the Ninth Circuit (including

24 courts within the same district) have taken inconsistent positions when addressing

25 whether a subsidiary possesses sufficient “control” of documents or items allegedly

26 in their parent corporation’s possession. *See, e.g., AFL Telecomms. LLC v.*

27 *SurplusEQ.com Inc.*, No. CV11-1086 PHX DGC, 2012 WL 2590557, at *2 (D.

28 Ariz. July 5, 2012) (relying on a Third Circuit case cited by the Ninth Circuit in *In*

29 *re Citric* to adopt a more expansive definition of “control”); *see also Thales*

30 *Avionics Inc. v. Matsushita Avionics Sys. Corp.*, No. SACV 04-454-JVS(MLGx),

31 2006 WL 6534230, at *4-5 (C.D. Cal. Mar. 8, 2006) (relying on case law outside

32 the Ninth Circuit to consider the “nature of the relationship” between a subsidiary

33 and its parent corporation to determine “control”); *Choice-Intersil Microsystems*,

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1 *Inc. v. Agere Sys., Inc.*, 224 F.R.D. 471, 472-73 (N.D. Cal. 2004) (same). However,
2 as duly noted by district courts within the Ninth Circuit, the Ninth Circuit has not
3 expanded the definition of “control” to include a practical ability to obtain
4 documents. *E.g., Seifi v. Mercedes-Benz U.S.A., LLC*, No. 12-cv-05493-TEH(JSC),
5 2014 WL 7187111, at *2-3 (N.D. Cal. Dec. 16, 2014) (binding Ninth Circuit law
6 does not rely on an expansive definition of “control”); *Dugan v. Lloyds TSB Bank*
7 *PLC*, No. 12-cv-02549-WHA (NVJ), 2013 WL 4758055, at *3 (N.D. Cal. Sept. 4,
8 2013) (acknowledging that while “control” between a subsidiary and its parent may
9 be established under a more expansive definition, the same is not true under Ninth
10 Circuit law); *Ehrlich v. BMW*, No. CV 10-1151-ABC (PJWx), 2011 WL 3489105,
11 at *1 (C.D. Cal. May 2, 2011) (“Plaintiff argues, it seems, that, based on the
12 inherent relationship between the two companies, [the subsidiary] must have access
13 to these documents. This theory has been rejected by the Ninth Circuit and is
14 rejected here.”); *Gen. Metals of Tacoma, Inc. v. Bean Env'tl. LLC*, No. C05-5306
15 RBL, 2006 WL 2927730, at *2 (W.D. Wash. Oct. 11, 2006) (refusing to expand the
16 test for determining “control”); *but see Stella Sys., LLC v. MedeAnalytics, Inc.*, No.
17 14-cv-00880-LB, 2015 WL 1870052, at *3 (N.D. Cal. Apr. 22, 2015) (applying
18 expansive definition of control when considering whether a party has control of
19 documents possessed by an unrelated company).

20 The Court agrees that the proper test for determining control between a
21 subsidiary and its parent is whether the subsidiary has the legal right to demand
22 production of the documents or things sought from its parent. Moreover, the Court
23 finds that Plaintiff failed to meet her burden to show that WHP has the proper
24 control over either NANA’s or GIS’s documents. Plaintiff argues a close
25 relationship between these companies: she alleges that WHP is a wholly owned
26 subsidiary, that the companies have overlapping executives and personnel, and that
27 these overlapping personnel made decisions with regard to her employment with
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1 WHP. Dkt. ## 20, 26. This is not sufficient to show that WHP has control over
2 GIS or NANA's documents. As the Court explained through the cited law above,
3 convenient access to documents does not translate to the legal control necessary for
4 this Court to grant the Motion. Though NANA or GIS may have been able to
5 exercise such control over WHP's documents, the reverse does not hold true based
6 upon Plaintiff's representations.

7 Plaintiff further alleges that NANA and GIS have acted as agents for WHP.
8 To support this argument, Plaintiff cites the Administrative Services Agreement
9 entered into by WHP and GIS. Dkt. # 26 at 5. However, this Agreement explicitly
10 denies any kind of agency relationship. Dkt. # 21 at 87 ("The parties hereto are
11 independent contractors and this Agreement shall in no way create a partnership,
12 joint venture, agency or other relationship between them.").

13 B. Inadequate Or Delayed Responses

14 In addition to seeking discovery from non-party affiliates, Plaintiff seeks
15 additional documents from WHP. Specifically, Plaintiff claims that WHP's
16 productions "have been consistently inadequate." Dkt. # 20 at 2. But Plaintiff does
17 not describe any particular inadequacy beyond her wish for the non-party affiliates'
18 documents. To be sure, she summarily claims that WHP made baseless objections
19 and has produced the documents at an unacceptably slow rate. Plaintiff asks the
20 Court to compel WHP to "fully respond" to her first set of interrogatories and
21 requests for production. Dkt. # 26 at 2.

22 The Court cannot compel WHP to "fully respond" when there is no
23 discussion or explanation of how WHP has failed to meet its discovery
24 responsibilities. *See Christ v. Blackwell*, No. CIV S-10-0760 EFB P, 2011 WL
25 3847165, at *2 (E.D. Cal. Aug. 30, 2011) (finding that the plaintiff bears the burden
26 to inform the Court which discovery requests are the subject of the Motion, which
27 requests are disputed, and why a defendant's responses are deficient). Granting

1 such a nebulous motion would be toothless because the Court could not reasonably
2 enforce an order that merely directs WHP to “complete [its] production.” Dkt. # 26
3 at 3. This is especially true in light of Plaintiff’s admission that her issue is one of
4 trust rather than a concrete concern about deficient responses: “she simply cannot
5 take Defendant’s word that its production is complete.” *Id.* at 2.

6 C. Expenses Under Rule 37

7 Based on Defendant’s own timeline, it appears that a large portion of the
8 discovery was produced after Plaintiff filed her motion to compel. Rule 37(a)(5)
9 requires the Court to award expenses when “disclosure or requested discovery is
10 provided after the [Motion to Compel] was filed.” Fed. R. Civ. P. 37(a)(5). “But
11 the court must not order this payment if . . . other circumstances make an award of
12 expenses unjust.” *Id.*

13 The Court finds that awarding expenses under these circumstances is unjust.
14 It appears that the parties met and conferred on several occasions and were able to
15 agree upon extensions of production deadlines. Though WHP sped up its
16 productions after the Motion, it appears that WHP had been consistently producing
17 documents prior to the Motion. Of course, should such a pattern continue—that is,
18 productions become increasingly available only after Plaintiff is forced to file
19 additional motions—the Court may find a future award of expenses justified.

20 **IV. CONCLUSION**

21 For all the foregoing reasons, the Court **DENIES** Plaintiff’s Motion to
22 Compel. Dkt. # 20.

23 Dated this 6th day of June, 2017.

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27 The Honorable Richard A. Jones
28 United States District Judge